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Mr. Brosnan

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

*[Protest of Air Force Contract Award]*

FILE: B-194553.2

DATE: March 23, 1981

MATTER OF: Klein-Sieb Advertising & Public  
Relations, Inc.

**DIGEST:**

1. Where amendments to solicitation state that negotiations are being reopened, formal protest of reopening not filed until after award is untimely since under GAO Bid Protest Procedures such protest must be filed not later than the next closing date for receipt of proposals.
2. Letters sent to agency before closing date for receipt of proposals and letter accompanying proposal expressing protester's view that it should receive award and indicating that possible protest was being considered do not constitute formal protest. Even if they are considered protest to agency, protest to GAO is untimely because agency's conducting negotiations and requesting best and final offers are actions adverse to protester's interest and protest was filed with GAO more than 10 days after those adverse actions.
3. Complaint that agency improperly found offeror to be responsible without first conducting preaward survey is not for consideration since preaward survey is not legal prerequisite to affirmative determination of responsibility and such determinations are not reviewed by GAO except in situations not applicable to this case.
4. Where offeror, because of misunderstanding, responded to contracting officer's request that its best and final offer be verified with modifications to its best and final offer and later withdrew proposed modifications, those communications did not constitute discussions as offeror's

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proposal was not altered and agency did not evaluate or rely on proposed modifications in determining that best and final proposal was acceptable.

Klein-Sieb Advertising & Public Relations, Inc. protests the Air Force's award of a contract to Rodgers, Cauthen & Baker under request for proposals F09650-79-R-0017, for advertising services in support of the recruitment of active duty personnel. The basic RFP, which was issued on March 2, 1979, was the subject of our decision, Jack Thrift and Company, B-194553, March 11, 1980, 80-1 CPD 187. In that decision we denied in part and dismissed in part a protest against the proposed award of a contract to Klein.

Klein complains that the agency improperly reopened negotiations and awarded the contract to Rodgers even though Klein was the lowest priced technically acceptable offeror at the time our Office issued the Jack Thrift decision. In short, the protester argues that continuing the negotiations after its offer was disclosed during the consideration of the earlier protest constituted an illegal action and breached the agency's good faith obligation to award the contract to Klein once the protest was decided. The protester also argues that it was improper to award the contract to Rodgers without conducting a preaward survey and refers to possible improper communications that may have occurred between the agency and Rodgers after best and final offers were submitted. Klein's contentions regarding the impropriety of reopening negotiations are untimely and will not be considered, while the remainder of the protest is without merit.

When Jack Thrift and Company filed its protest in April 1979, Klein was the lowest priced of the four offerors (including Rodgers) considered technically acceptable and was the Air Force's proposed choice for award. After the Jack Thrift protest, which concerned allegations that Air Force employees "rigged" the procurement in favor of Klein, was denied in March 1980, the Air Force issued amendment 0005 to the original solicitation which revised the statement of work, method of payment, evaluation criteria and contract provisions and duration. The amendment was sent to

all offerors (including Klein) within the competitive range and announced that negotiations were reopened and that proposals were to be submitted by April 15. Shortly thereafter on April 1, the agency issued amendment 0006 which again announced the reopening of negotiations and made some technical changes, but did not change the April 15 date for receipt of proposals.

On April 15, all four offerors submitted proposals. Klein's proposal was accompanied by a letter which indicated "this response is submitted under duress pending possible protest action per the decision of the Comptroller General of the United States in File: B-194553, dated 11 March 1980." Prior to this by letters dated March 17 and April 3, Klein indicated that it was entitled to the award under the Jack Thrift decision. Nevertheless, Klein participated in negotiations and submitted a best and final offer by April 23.

Klein was informed on May 4 that award had been made to Rodgers as the low offeror. Klein then protested the award to the agency by letter dated May 5. This protest was based on the premise that the agency had no authority to request best and final offers because the procurement was formally advertised. In addition, Klein requested that it be provided all documentation regarding the award of the contract pursuant to the Freedom of Information Act. Following a series of discussions with agency personnel, Klein filed a subsequent protest with the agency on June 2 setting forth its position as it is presently constituted. The instant protest was filed with our Office on June 6.

The portion of Klein's protest pertaining to the reopening of negotiations is untimely. Both amendments 0005 and 0006 stated that negotiations were being reopened. Thus, any objection to that proposed action should have been protested not later than April 15, the "next closing date for receipt of proposals." 4 C.F.R. § 20.2(b)(1)(1980). Although Klein indicated in its two letters to the agency prior to April 15 that it believed that it should receive the award pursuant to the Jack Thrift decision and stated in its letter accompanying

its April 15 proposal that it was considering "possible protest action" no formal protest was filed until after Klein was informed that it would not receive the award. [Since none of these communications expressed a present intent to protest, it is our view that both Klein's June 2 protest to the agency and its June 4 protest filed with our Office are untimely as far as the issues relating to the reopening of negotiations are concerned.

Moreover, even if we were to consider Klein's three letters as constituting a protest to the agency its protest to our Office would be untimely. Our Bid Protest Procedures require that if a protest is initially filed with the contracting agency in a timely manner, a subsequent protest to our Office must be filed within 10 days of when the protester learns of initial adverse agency action on the protest. 4 C.F.R. § 20.2(a)(1980). In this instance, both the agency's conducting negotiations with all offerors, including Klein, on April 17 and 18 and its issuing a letter on April 18 calling for best and final offers to be submitted on April 23 would have constituted notice of adverse action on Klein's protest. See Security Assistance Forces and Equipment International, Inc., B-195196; B-195196.2, July 10, 1980, 80-2 CPD 24. Since Klein's protest was not filed with our Office until June 6 that portion of its protest pertaining to the reopening of negotiations would also be untimely under this alternate interpretation of the record.

We believe that it is appropriate, however, to comment on Klein's contention that it was entitled to the award because of a statement in the Jack Thrift decision that "we [our Office] do not believe Thrift has shown the Air Force improperly determined Klein-Sieb entitled to the award of this contract as the lowest priced technically acceptable offer." That statement in no way obligated the agency to award a contract to Klein but merely indicated that the protester's allegations were without merit. It was clearly up to the agency to decide, after the decision was issued, whether it was appropriate to award the contract under the initial solicitation or whether changed circumstances warranted cancellation or amendment of the solicitation.)

The timely portion of the protest consists of Klein's contention that the agency doubted whether Rodgers understood what was required in performing the contract and thus knew that Rodgers submitted an unreasonably low offer and therefore improperly determined that Rodgers was a responsible offeror without first conducting a preaward survey.

Since the contracting officer's signing the contract with Rodgers constituted an affirmative determination of responsibility, New Britain Hand Tools Division, Litton Industrial Products, Inc., B-192126, February 1, 1979, 79-1 CPD 77; Defense Acquisition Regulation (DAR) § 1-904.1 (DAC 76-25, October 31, 1980), the protester's contention regarding the lack of a preaward survey in essence concerns that determination. Where, as here, the contracting officer has determined an offeror to be responsible, that affirmative determination will not be questioned by this Office unless either fraud or bad faith is alleged on the part of procuring officials, or where the solicitation contains definitive responsibility criteria which have allegedly not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Since Klein raised neither of these allegations and since there is no requirement that a preaward survey be conducted in all cases to determine the responsibility of a prospective contractor we will not question the agency's determination regarding Rodgers. See Bristol Electronics, Inc., B-191449, August 4, 1978, 78-2 CPD 88.

The protester also refers to communications between the agency and Rodgers after best and final offers were submitted. The record shows that after such offers were submitted on April 23, the agency contacted Rodgers and asked that firm to review its proposal for a possible mistake due to the wide disparity in prices of the offers and requested that the offer be verified in writing. As the result of an apparent misunderstanding, Rodgers' written verification, which was signed by an individual other than the person who had represented Rodgers in negotiations, contained conditions which were inconsistent with Rodgers' best and final offer. The agency

then telephoned Rodgers and informed that firm its April 25 letter containing the verification was not responsive to the agency's request. Rodgers indicated that its response was a mistake and it withdrew its April 25 letter and confirmed its best and final offer.

The regulations do not explicitly deal with this situation. DAR § 3-805.5(c) envisions the resolution of most mistakes in proposals during written or oral discussions, while DAR § 3-805.5(d) deals with resolving suspected mistakes when award is contemplated to be made without discussions on the basis of initial proposals. There is no provision which explicitly sets forth procedures to be followed when an error is suspected as a result of what is contained in a best and final offer. It is obvious from a reading of DAR § 3-805.5 in its entirety, however, that in general [the seeking and obtaining of verification from an offeror is not to be considered discussions, which would necessitate a round of discussions with all offerors in the competitive range, but that a material change to a proposal as a result of a verification request is to be permitted only through discussions unless what was actually intended is obvious from the proposal itself.] This reflects the drafters' concern that the integrity of the competitive negotiation process be maintained while agencies have some reasonable flexibility to react to possible proposal errors without having to invoke the discussion process.

Here we think the agency's actions were consistent with the thrust of DAR § 3-805.5. [The agency sought verification of a possible error; the verification was obtained, but along with it came what appeared to be another possible mistake, i.e., provisions inconsistent with the best and final offer. In our view, the agency's subsequent contact with the offeror was in effect a request for further verification which was prompted by the response received to the initial verification request.] The offeror's "withdrawal" of that initial verification and the substitution of a simple verification of the best and final offer did not involve a change to that offer, but only to the initial verification response.] Just as DAR 3-805.5 (d)(3) permits an offeror to request correction of a proposal and later withdraw that request and instead verify the proposal as submitted, without those actions constituting discussions, we think Rodgers' actions here -- in effect verifying its proposal with modifications (which

could not be accepted without further discussions) and then withdrawing the modifications -- (need not be viewed as constituting discussions with the agency. Certainly, as no change to the best and final offer was permitted or ever considered, we are unable to perceive any prejudice to competing offerors or any harm to the competitive system by these agency/Rodgers contacts and the protester has not identified any.

The protest is dismissed in part and denied in part.]

*Milton J. Aroskar*

Acting Comptroller General  
of the United States